LIBRARY

Supreme Court of the United States

October Term, 1969

No. 1121

ESTES EXPRESS LINES, ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and RAILWAY EXPRESS AGENCY, INCORPORATED,

Appellees.

MOTION TO AFFIRM OF APPELLEE, RAILWAY EXPRESS AGENCY, INCORPORATED

JOHN C. ARMSTRONG
WILLIAM H. MAHR
219 East 42nd Street
New York, N. Y. 10017

H. MERRILL PASCO
GEORGE F. BAILEY, JR.
HUNTON, WILLIAMS, GAY,
POWELL & GIBSON
700 East Main Street
Richmond, Virginia 23219

Counsel for
Appellee

TABLE OF CONTENTS

	Page
STATEMENT	1
ARGUMENT	5
1. The Supporting Shipper Statements	5
2. There is No Conflict Between the Fourth and Ninth Circuits	11
3. No Settled Administrative Construction	11
4. A Final Decision Will Not Reduce Litigation on Applications for Temporary Authority	13
CONCLUSION	14

TABLE OF CITATIONS

Cases

Acme Cartage Co. v. United States, 290 F.Supp. 458 (W.D. Wash. 1968) 11

Alcoa S.S. Co. v. United States, 338 U.S. 421 (1949) 14

Auclair Transportation, Inc. v. United States, 221 F.Supp. 328 (D. Mass. 1963) aff'd per curiam 376 U.S. 514 (1964) 8

Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407 (1942) 10

Commissioner v. South Texas Lumber Co., 333 U.S. 496 (1948) .. 12

Freight, All Kinds, L.C.L. Container Charges—U.S.A., 323 I.C.C. 468 (1964) 8

Hussey v. United States, 271 F.Supp. 650 (N.D. Cal. 1967) 15

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 11

Ludecke v. Watkins, 335 U.S. 160 (1948) 14

Men's & Boys' Outerwear—Bruceton, Tenn. to U.S.A., 325 I.C.C. 284 (1965) 8

Page

Mississippi Valley Barge Line Company v. United States, 252 F.Supp. 162 (E.D. Mo. 1966) 9

Mistletoe Express Service Extension—Texas, 61 M.C.C. 737 (1953) 8

Railway Express Agency, Inc. Extension—Durant-Kosciusko, 34 M.C.C. 111 (1942) 8

Roadway Express, Inc. v. United States, 263 F.Supp. 154 (N.D. Ohio 1966) 9

Service v. Dulles, 354 U.S. 363 (1957) 10

Transportation Activities of Arrowhead Freight Lines, 63 M.C.C. 573 (1955) 8

Statutes

Code of Federal Regulations, Title 49,
§ 1131, Temporary Authority Regulations ..... passim

Interstate Commerce Act, § 210a(a) 13

United States Code, Title 49:
§ 307 13
§ 310a(a) ..... passim

IN THE

Supreme Court of the United States

October Term, 1968

No. 1121

ESTES EXPRESS LINES, ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND RAILWAY EXPRESS AGENCY, INCORPORATED,

Appellees.

MOTION TO AFFIRM OF APPELLEE, RAILWAY EXPRESS AGENCY, INCORPORATED

Appellee, Railway Express Agency, Incorporated (REA), Intervenor Defendant in the proceedings below, moves this Court pursuant to its Rule 16 to affirm the judgment of the special three-judge district court on the ground that the questions are so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court dismissing an action brought to set aside (1) an order of the Interstate Commerce Commis-

sion (Commission), by its Temporary Authorities Board, dated December 7, 1967, granting 120-day temporary authority to REA to operate in interstate commerce as a common carrier by motor vehicle, auxilliary to or supplemental of its express service, carrying general commodities moving in express service between Washington, D. C. and Richmond, Virginia and six intermediate or off-line points, and (2) an order of the Commission, by Division 1, acting as an appellate division, dated January 30, 1968 denying appellants' petition for reconsideration and affirming the Commission's order of December 7, 1967.[1]

There is no dispute as to the facts in the case. Pursuant to notice given REA on September 5, 1967, the Richmond, Fredericksburg and Potomac Railroad Company (RF&P) on October 15, 1967 discontinued its handling of less-than-carload express shipments between Washington and Richmond, Virginia, including the intermediate and off-line points referred to above. Upon discontinuance of this service there remained no rail service on which express traffic handled by REA could be transported between Washington and Richmond and the intermediate and off-line points involved, and REA was without a vital link in its coordinated nationwide express service.

In order to insure the uninterrupted continuance of express service to and from these points comparable to that provided before the rail service was discontinued, for which there was an immediate and urgent public need, REA promptly sought emergency temporary authority pursuant to 49 U.S.C. 310a(a) and 49 C.F.R. 1131.2(d) to operate by motor vehicle on a regular schedule over the proposed

---

[1]The opinion of the three-judge court is reported at 292 F. Supp. 842 and is contained in Appendix A of the Jurisdictional Statement (hereafter J.S.) at page 17.

route until application for temporary authority could be filed and acted upon pursuant to 49 U.S.C. 310a(a) and 49 C.F.R. 1131.2(a).[2]

On October 5, 1967 the Commission granted REA 30-day emergency temporary authority effective October 15, 1967, which was later extended for an additional 30 days until December 14, 1967. This emergency temporary authority was further extended for 30 days commencing December 15, 1967.

On October 30, 1967 REA applied to the Commission for 120-day temporary authority to continue to operate over this route pending the filing of an application for permanent authority.[3] This application was signed and verified by REA's Vice President and contained a detailed statement of REA's operation and the need for the operating rights for express service by motor vehicle between Richmond and Washington. The application stated that REA had no knowledge of any carrier in the territory which had nationwide surface, air, motor, and other connections providing coordinated express service. The application was supported by statements from ten shippers and one merchants association setting forth their need for the express service which had been provided by REA through its use of the rail service of the RF&P and which to their knowledge could not be provided by any other carrier.

Appellants filed protests to the grant of the authority sought by REA, but on December 7, 1967 the Commission granted the application for temporary authority which became effective December 26, 1967. The Commission found

---

[2]49 U.S.C. 310a(a) and 49 C.F.R. 1131 are reproduced in Appendix C, J.S. 28-40.

[3]Notice of the filing of the application was published in the *Federal Register* on November 7, 1967, Vol. 32 at page 15515.

that REA had established an immediate and urgent need, as required by law, for the temporary service proposed (J.S. 24-26). On December 27, 1967 appellants sought reconsideration by the Commission of the order granting the temporary authority to REA. On January 30, 1968 the Commission denied appellants' petition for reconsideration for the reason that "no showing has been made which would warrant a conclusion different from that reflected by the said order of December 7, 1967" (J.S. 41). On March 20, 1968 REA was advised by the Commission that the temporary authority was continued until further order of the Commission pending disposition of the corresponding application for permanent authority which was filed with the Commission by REA on December 11, 1967.

On May 17, 1968 appellants filed their complaint in this proceeding seeking a permanent injunction against the Commission's orders of December 7, 1967 and January 30, 1968, alleging that they were unlawful since they granted temporary authority in the absence of a proper showing of an immediate and urgent need in an area where existing motor carrier service was available. Appellants' principal complaint was that the supporting statements of shippers filed by REA failed to meet in every particular the specific requirements of the Commission's rule as to such statements (49 C.F.R. 1131.2(c))[4] and that therefore, as a matter of law, the Commission was bound to deny the application.

The Commission's grant of temporary authority to REA was unanimously affirmed by the three-judge district court on November 18, 1968 holding that the Commission's discretionary power to grant such temporary authority was supported by the record and had not been exercised arbitrarily or capriciously. It found that appellants were not

[4]See J.S. 31 for the text of the rule.

providing express service comparable in all respects to that provided by REA; that appellants had failed to allege facts showing they were providing such service; and that the shipper statements filed by REA in support of its application were properly considered by the Commission since they met the requirements and fulfilled the purpose of the Commission rule with respect to such statements.

ARGUMENT

The decision of the district court is plainly correct and appellants present no substantial question for the decision of this Court. The questions presented by appellants involve nothing more than the highly technical argument that the Commission is bound by its rules as to what supporting shipper statements must set forth, and that the alleged failure of the supporting statements to comply with such requirements in every particular required the Commission as a matter of law to deny the application for temporary authority (J.S. 2-3). Appellants erroneously assert that there is a conflict on this question between the Fourth and Ninth Circuits; that the district court's decision reverses settled administrative construction; and that a final resolution of the question will tend to lessen further litigation before the Commission and the federal courts. There is no basis for these assertions.

1. The Supporting Shipper Statements

The Commission is vested with broad discretionary authority under 49 U.S.C. 310a(a) to grant temporary authority to provide motor carrier service "without hearings or other proceedings" where there is an immediate and urgent need for such service in a territory where there is no carrier capable of providing such need. It has promulgated rules for the filing and processing of applications for

such temporary authority. One of these rules requires that such applications be supported by shipper statements containing eleven items of information, 49 C.F.R. 1131.2(c).

This rule specifying the contents of shipper statements was intended to assist the Commission in making a fair adjudication as to such applications, as the Commission made clear in its January 23, 1968 press release (J.S. 50). Appellants contend that strict compliance with this rule is a mandatory prerequisite to the Commission's exercise of its discretionary authority to grant applications for temporary authority. The district court held that the shipper statements filed in this proceeding accomplished the purpose of the rule and contained reasonable responses to the eleven inquiries (J.S. 21). This is a simple factual determination and presents no substantial question for consideration by this Court. The district court did not hold that the Commission's rules did not have to be complied with. It held that a consideration of the rule as to supporting shipper statements in the light of the particular circumstances of this case led to the conclusion that the requirement of the rule had been fully met (J.S. 21). There is no question as to the adequacy of the shipper statements (which appellants improperly and unjustifiably term "boiler plate" (J.S. 5)) except as to the response to items 8 and 9 which ask whether efforts were made to obtain the required service from existing carriers and the names of the carriers which failed or refused to provide the service. In response to these inquiries each of the shippers said in their supporting statements, which are a part of the record:

> "I am advised that effective on or about October 15, 1967, line-haul operations previously used by REA to move my express traffic will no longer be available, and that, as of that date, REA will not be able to continue to furnish me with the express service it now does, unless it can obtain authority to operate its own

trucks in lieu of the line-haul operations being discontinued. I would be seriously inconvenienced, and my business would be adversely affected if the particular type of service currently received from REA were to become unavailable. Accordingly, I support REA's application for authority to operate its own trucks in lieu of the line-haul operations previously used by it.

"I use all types of common carrier services, and I am familiar with all available. For that part of my traffic now moved in REA's express service, no other service could adequately meet my needs. If the service now furnished me by REA became unavailable, I would be seriously inconvenienced, and my business adversely affected.

"I am currently obtaining the service I need from REA Express, and, accordingly, have had no occasion to seek express service from anyone else. Within my knowledge, however, no service other than that of REA possesses all of the special characteristics required for adequate handling of my express shipments. If REA service became unavailable, I would have an immediate and urgent need which no other carrier could meet."[5]

The district court properly held that inquiries 8 and 9 of the rule were reasonably answered when the shippers explained in their statements *why* they had made no efforts to obtain express service from existing carriers, particularly in view of the statement in REA's application that no comparable service existed in the territory and in light of the failure of the appellants to allege facts showing that they were providing transportation comparable in all respects to the service of REA (S.J. 21). It would be a vain and

[5]This is the response given by each shipper to items 8 and 9 of the rule, and, accordingly, the responses to items 10 and 11 were renumbered 9 and 10 in the shippers' answers. Thus the statement in footnote 3, J.S. 5 incorrectly sets forth the response of the shippers to item 9 of the rule.

futile thing to require the shippers to state that they had looked elsewhere and found no comparable service in response to inquiries 8 and 9 of the rules, and it borders on the absurd to argue, as appellants have, that failure of the supporting shippers to make such a statement deprives the Commission of its discretionary power to grant the application for temporary authority.

The district court specifically found that REA was an express carrier and that appellants did not offer a comparable service (J.S. 21). As to this finding there can be no dispute on the basis of existing authorities. The Commission has long recognized a distinction between general-commodity motor carrier service, such as provided by appellants, and an express service such as that provided by REA. *Railway Express Agency, Inc. Extension—Durant-Kosciusko,* 34 M.C.C. 111, 114 (1942); *Mistletoe Express Service Extension—Texas,* 61 M.C.C. 737, 744-45 (1953); *Transportation Activities of Arrowhead Freight Lines,* 63 M.C.C. 573, 579-83 (1955). Commission decisions clearly recognize that "express service" connotes unique characteristics distinct from ordinary motor carrier service. *Freight, All Kinds, L.C.L. Container Charges—U.S.A.,* 323 I.C.C. 468 (1964); *Men's & Boys' Outerwear—Bruceton, Tenn. to U.S.A.,* 325 I.C.C. 284 (1965). The distinction between express and ordinary motor freight service formulated by the Commission has been adopted by the lower federal courts and approved by this Court. *Auclair Transportation, Inc.* v. *United States,* 221 F.Supp. 328 (D. Mass. 1963) *aff'd per curiam,* 376 U.S. 514 (1964). The distinction between the motor freight service performed by appellants and the express service performed by REA is well established as a matter of law.

Even though existing carriers were known to the shippers and receivers to be unable to provide express service, appellants nevertheless contend that their failure to make the

inquiries called for by items 8 and 9 of the Commission's rule rendered the application fatal. In support of this contention that the Commission is bound by its administrative regulations, appellants cite the press release of the Commission of January 23, 1968 (J.S. 50-51). Yet, the last paragraph of this release states that temporary authority applications will be denied where, because of noncompliance of the rules, "a fair adjudication is not possible on the record before the Commission." It is clear, as found by the district court, that the record contained ample information to enable the Commission to render a fair adjudication (J.S. 21).

The district court has found that the shipper statements complied with the rules by "reasonably" answering the inquiries of 8 and 9 (J.S. 21). Certainly no greater standard of particularity is required in complying with administrative regulations. The Commission cannot, by the promulgation of rules pertaining to the form and content of shipper statements, divest itself of the discretion conferred on it by 49 U.S.C. 310a(a). *Roadway Express, Inc.* v. *United States,* 263 F.Supp. 154 (N.D. Ohio 1966). Yet this is inevitably the result if, as appellants contend, the rules in question are absolutely binding on the Commission. As the district court aptly said in *Roadway Express, Inc.* v. *United States, supra:*

> ". . . [A] reading of these rules indicate that their purpose is to facilitate the Commission's handling of requests for temporary authority. The rules reflect no intention to reduce or relinquish its statutory discretionary power to issue certificates of temporary authority." (p. 159)

Appellants rely on the case of *Mississippi Valley Barge Line Company* v. *United States,* 252 F.Supp. 162 (E.D. Mo. 1966) as authority that the Commission, though acting pursuant to statutory discretion, is nevertheless rigidly

bound by its rules and regulations. That case is readily distinguishable from the present case on at least two separate grounds: (1) *Mississippi Valley* involved a grant of *permanent authority* under entirely different Commission rules than those governing applications for temporary authority. The rules governing temporary authorities have been expressly held not to limit in any way Commission discretion in considering such applications. *Roadway Express, Inc.* v. *United States, supra.* (2) The application for permanent authority in *Mississippi Valley* contained fraudulent misrepresentations and showed a wilful attempt on the part of the applicant to deceive the Commission and circumvent its rules. In the present case there was no evidence of fraud or deception. If anything, the application and supporting shipper statements show a studied effort to comply with Commission rules. Other cases cited by appellants to the effect that the Commission, acting pursuant to statutory discretion, is absolutely bound by temporary authority regulations are likewise not in point.[6]

---

[6]*Service* v. *Dulles,* 354 U.S. 363 (1957) involved a situation where discretionary action by a government administrator was expressly foreclosed by regulation unless certain procedures had been followed. I.C.C. regulations pertaining to the form and content of shipper statements impose no such limitation on Commission discretion to grant temporary authority under Section 210a(a). See *Roadway Express, Inc.* v. *United States, supra.*

The regulations of the Federal Communications Commission involved in *Columbia Broadcasting System, Inc.* v. *United States,* 316 U.S. 407 (1942) prohibited radio stations throughout the country from entering into certain types of contracts with broadcasting networks such as CBS. Failure by a station to observe the regulation resulted in loss of its FCC license. These regulations are clearly unlike the I.C.C. regulations concerning the content of shipper statements, which were promulgated merely to provide a procedural guideline for the preparation and processing of temporary authority applications.

2. There is No Conflict Between the Fourth and Ninth Circuits

Appellants' attempt to predicate jurisdiction on alleged conflict in the decisions of the Fourth and Ninth Circuits is feeble and without merit. In *Acme Cartage Co.* v. *United States,* 290 F.Supp. 453 (W.D. Wash. 1968) both the applicants and the protestants were engaged in motor *freight* transportation. In the present case, while appellants are motor freight carriers, REA is an *express* carrier. In the *Acme Cartage* case the protestant carriers were apparently providing the same freight service as that proposed by the applicants. Under these circumstances the information called for by inquiries 8 and 9 of the rule had relevance to the disposition of the application. In the present case, however, it is clear from the record that REA's express service is unique and distinct from the motor freight service performed by appellants. Moreover, the court in *Acme Cartage* found that the information called for by inquiries 8 and 9 of the rules was not only omitted from supporting statements but did not appear *elsewhere* in the record. In sharp distinction, in the present case the information called for in 8 and 9 was found by the court below to be provided elsewhere in the record.[7] It is submitted that the supposed conflict of decision between the two circuits simply does not exist and therefore, the judgment below should be affirmed. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387 (1923).

3. No Settled Administrative Construction

As an additional ground for this Court's taking jurisdiction in this case, appellants contend that the decision of the

[7]After distinguishing the *Acme Cartage* case, Judge Butzner, referring to the present case, states "Here lack of comparable service is indicated by the shippers' statements, REA's statement, and, indeed, can be inferred from the protest itself" (J.S. 21).

district court in some way reverses alleged settled administrative construction of Section 49 U.S.C. 310a(a), citing *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496 (1948). There is no evidence in the record in this case of long standing administrative construction which the district court has reversed. The Commission adopted new rules in 1965 with respect to the filing and processing of applications for temporary authority to assist it in making fair adjudication of the applications. The publication of these rules and of the press release concerning them referred to by appellants clearly do not constitute any long-settled administrative construction of Section 49 U.S.C. 310a(a).

In *Commissioner* v. *South Texas Lumber Co., supra,* relied on by appellants, there were regulations of the Commissioner of Internal Revenue and long-standing tax practices recognized by statutes and judicial opinions which were alleged to be contrary to the decision of the Fifth Circuit in that case. No such situation exists in the present case. The decision of the United States District Court in Ohio in 1966 in *Roadway Express, Inc.* v. *United States, supra,* that the Commission's rules concerning applications for temporary authority adopted in 1965 were intended to facilitate the Commission's handling of requests for temporary authority and did not reflect an intention on the part of the Commission to reduce or relinquish its statutory discretionary power to issue certificates of temporary authority correctly states the purpose of the rules and the interpretation which the Commission has placed on the statute in issuing these rules. The district court in the present case said and held nothing which is inconsistent with this interpretation.

4. A Final Decision Will Not Reduce Litigation on Applications for Temporary Authority

Appellants complain that the judgment of the district court makes impossible any rebuttal of the supporting shippers' claims of a need for the proposed service. This complaint can only be based upon appellants' misinterpretation of the district court's opinion. Appellants state that the district court held, in effect, that supporting shipper statements did not have to meet all the requirements of 49 C.F.R. § 1131.2(c) (J.S. 11). Yet the plain and clear holding of the court below was that the rules were "reasonably" met (J.S. 21).

Next, based upon their incorrect interpretation of the opinion below, appellants conclude that the decision means that REA is no longer subject to the requirements of Section 210a(a) of the Interstate Commerce Act. This conclusion is simply not supported by the judgment of the district court. Appellants then launch into what appears to be an attack on practice and procedure before the Commission. Their argument relating to the duration of grants of temporary authority and the unduly prolonged procedure of obtaining corresponding permanent authority is not a proper subject matter for this appeal. If appellants feel this strongly that practice and procedure before the Commission produces injustice, their remedy is legislative, not by appeal to this Court.

Finally appellants claim that if this Court notes probable jurisdiction and decides the questions presented, a substantial part of the litigation now anticipated under 49 U.S.C. 310a(a) (temporary authority) and 49 U.S.C. 307 (permanent authority) will be effectively checked. In support of this assertion, appellants cite and quote from two decisions of this Court which, while announcing a sound principle, have no application in the present case. Conse-

quently, this case does not have any appreciable effect on future litigation before the Commission.

In *Alco S.S. Co.* v. *United States,* 338 U.S. 421 (1949), this Court granted certiorari in order to interpret certain terms in the government's standard bill of lading because there were a large body of similar claims at that time pending which would be determined by such interpretations. In *Ludecke* v. *Watkins,* 335 U.S. 160 (1948), this Court granted certiorari to make a final determination as to the meaning of the words "dangerous" and "declared war" in the Alien Enemy Act of 1798, partly because there were 530 alien enemies under order to leave the United States whose disposition awaited the Court's determination of the meaning of these words in the statute.

We have no such situation in the present case where the final outcome will have any controlling effect on subsequent applications for temporary or permanent authority as each must be decided on its own facts as disclosed by the application, the supporting shipper statements and other evidence produced by the applicants and the protestants.

CONCLUSION

Though appellants have attempted to give this case the appearance of substantiality, it involves, at most, the question whether the district court erred in its factual finding that the supporting shipper statements "reasonably" complied with the Commission's rules. It is clear from the entire record that the Commission's action was proper. There is no basis for appellants' assertion that the decision of the district court in effect carves out a special status for REA when seeking temporary operating authority from the Commission. The district court merely found that the Commission's rules had been reasonably complied with and that it was justified on the record in this case in making the factual

determination, in the exercise of its discretionary authority, that the motor freight carriers, who are the appellants in this case, were not offering service which was comparable in all respects to that provided by REA on the route in question. The district court's decision went no further than this and will have no profound or important effect on the transportation industry. In affirming the action of the Commission the district court properly exercised its jurisdiction with its limited scope of review extending solely to the issue of whether the Commission's determination of immediate and urgent need was arbitrary, capricious or without authority of law. *Hussey* v. *United States,* 271 F. Supp. 650 (N.C. Cal. 1967).

It is therefore respectfully submitted that appellants present no substantial question for the decision of this Court; that no conflict exists between the Circuits on the question at issue; and that the judgment and decree of the district court should be affirmed.

Respectfully submitted,

JOHN C. ASHTON
WILLIAM H. MARX
219 East 42nd Street
New York, N. Y. 10017

H. MERRILL PASCO
GORDON F. RAINEY, JR.
HUNTON, WILLIAMS, GAY,
POWELL & GIBSON
700 East Main Street
Richmond, Virginia 23212

Counsel for Appellee, Railway Express Agency, Incorporated

CERTIFICATE OF SERVICE

I, H. Merrill Pasco, an attorney for the appellees and a member of the Bar of the Supreme Court of the United States, certify that a copy of the Motion to Affirm of appellee, Railway Express Agency, Incorporated has been served by first-class mail, postage prepaid, upon the following parties: Hon. Erwin Griswold, Solicitor General, Hon. Edwin M. Zimmerman, Assistant Attorney General, and John H. D. Wigger, Attorney, Department of Justice, Washington, D. C. 20530; C. V. Spratley, Jr., United States Attorney, Alexandria, Virginia 22313; Robert W. Ginnane, General Counsel, and Raymond M. Zimmet, Attorney, Interstate Commerce Commission, Washington, D. C. 20423; Francis W. McInerny and Harry J. Jordan, MacDonald & McInerny, 1000 Sixteenth Street, N.W., Washington, D. C. 20036; Linwood C. Major, Jr., Major, Sage, Vance & King, Suite 301 Tavern Square, 421 King Street, Alexandria, Virginia 22314.

Dated at Richmond, Virginia this 4th day of April, 1969.

H. Merrill Pasco
700 East Main Street
Richmond, Virginia 23212